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July 7, 2003

Via Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

RE: NPCR, INC d/b/a Nextel Partners Petition for Designation as an
Eligible Telecommunications Carrier in the Commonwealth of
Pennsylvania; Docket No. 96-45; **COMMENTS OF THE
PENNSYLVANIA TELEPHONE ASSOCIATION**

Dear Ms. Dortch:

Enclosed, for filing with the Commission are the Comments of the Pennsylvania Telephone Association in the above-captioned consolidated proceedings. Please acknowledge receipt and acceptance of this filing via electronic medium.

If you have any questions concerning this filing, please direct them to me.

Very truly yours,

Norman James Kennard

Norman James Kennard

NJK/rjh
Enclosures

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on)	CC Docket 96-45
Universal Service)	
)	
NPCR, INC. d/b/a NEXTEL PARTNERS)	
)	
Petition for Designation as an)	
Eligible Telecommunications Carrier)	
in the Commonwealth of Pennsylvania)	

**COMMENTS OF THE
PENNSYLVANIA TELEPHONE ASSOCIATION**

I. SUMMARY

The Pennsylvania Telephone Association (“PTA”)¹ files these Comments in opposition to the Petition for Designation as an Eligible Telecommunications Carrier (“ETC”) by NPCR, INC. d/b/a Nextel Partners (“Nextel”) throughout its licensed service

¹ The Pennsylvania Telephone Association is Pennsylvania's oldest trade organization for the local exchange carrier industry. PTA represents more than 30 telecommunications companies that provide a full array of services over wire line networks. PTA member companies include ALLTEL Pennsylvania Inc.; Armstrong Telephone Co. North; Armstrong Telephone Co. PA; Bentleyville Telephone Co.; Buffalo Valley Telephone Co.; Citizens Tel Co. of Kecksburg; Citizens Telecomm. Co of NY; Commonwealth Telephone Co.; Conestoga Tel. & Telegraph Co.; Denver & Ephrata Tel. & Tel Co.; Deposit Telephone Co.; Frontier Comm. Of Breezewood; Frontier Comm. Of Canton; Frontier Comm. Of Lakewood; Frontier Comm. Of Oswayo River; Frontier Comm. Of PA; Hancock Telephone Co.; Hickory Telephone Co.; Ironton Telephone Co.; Lackawaxen Telephone Co.; Laurel Highland Telephone Co.; Marianna & Scenery Hill Tel. Co.; North Penn Telephone Co.; North Pittsburgh Telephone Co.; NE PA Telephone Co.; Palmerton Telephone Co.; Pennsylvania Telephone Co.; Pymatuning Ind. Telephone Co.; South Canaan Telephone Co.; TDS Telecomm/Mahoney & Mahantango; TDS Telecomm/Sugar Valley Tele.; United Telephone Co. of PA.; Venus Telephone Corp.; West Side Telephone Co.; and Yukon Waltz Telephone Co. PTA members support the concept of universal service and are leaders in the deployment of advanced telecommunications capabilities. As referenced herein, PTA represents its member companies that have not filed comments individually on this topic. Each member company reserves its rights to participate

area in the Commonwealth of Pennsylvania. Nextel's Petition is not properly before this Commission; this Petition should have been brought before the Pennsylvania Public Utility Commission ("PAPUC"). The PTA member companies provide high-quality, universal service to the citizens of Pennsylvania located in their certificated service territories.² By contrast, Nextel has not established any facts that prove it meets the statutory requirements for ETC designation, and as such, its Petition should be denied.

II. JURISDICTION OVER THIS PETITION PROPERLY LIES WITH THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

The PAPUC has the primary responsibility for making ETC designations in the Commonwealth of Pennsylvania.³ When a state commission does not have authority over a potential ETC designee, the Federal Communications Commission ("Commission") has the authority to entertain the ETC Petition.⁴ While Nextel included a letter from PAPUC Secretary James J. McNulty stating that the PAPUC does not make ETC designations for commercial mobile radio service (CMRS) providers, the PTA contends that the letter erred in relying on Pennsylvania's CMRS exception found at 66 Pa.C.S. § 102 in making this determination.

The Pennsylvania CMRS exception states that, for purposes of the Pennsylvania Public Utility Code, the term "Public Utility" does not include "[a]ny person or corporation, not otherwise a public utility, who or which furnishes mobile domestic cellular radio telecommunications service."⁵ This provision effectively exempts CMRS

individually in the future if necessary.

² A recent FCC report concluded that Pennsylvania ranked first in the country with a 98% telephone subscribership rate.

³ 47 U.S.C. § 214(e)(2).

⁴ 47 U.S.C. § 214(e)(6).

⁵ 66 Pa.C.S. § 102

providers from PAPUC regulation concerning matters found in the Pennsylvania Public Utility Code.⁶

The authority of the PAPUC to designate telecommunication providers as ETCs, however, is derived from Section 214 of the Telecommunications Act of 1996 (“TCA 96”), which does not contain a CMRS exception.⁷ Section 214 is a grant of authority that is completely independent from the Pennsylvania Public Utility Code, and as such, is not concerned with any exception from regulation found in the Pennsylvania Public Utility Code. As Section 214 does not contain any CMRS exemption, Nextel should be required to bring its ETC Designation Petition before the PAPUC and not this Commission.

III. NEXTEL DOES NOT PROVIDE UBIQUITOUS SERVICE AND THEREFORE, IS NOT AN ELIGIBLE TELECOMMUNICATIONS CARRIER

A. Requirements To Be Designated As An Eligible Telecommunications Carrier

To be designated as an ETC, a common carrier must offer certain, specified services “**throughout the service area** for which the designation is received.”⁸ These services include: (1) voice grade access to the public switched network; (2) local usage; (3) dual tone multi-frequency signaling or its functional equivalent; (4) single party service or its functional equivalent; (5) access to emergency services; (6) access to operator services; (7) access to interexchange service; (8) access to directory assistance; and (9) toll limitation for qualifying low-income customers.⁹ In addition, if the ETC

⁶ 66 Pa.C.S. § 101, *et seq.*

⁷ 47 U.S.C. § 214(e)

⁸ 47 U.S.C. § 214(e)(1)(A) (Emphasis supplied).

⁹ 47 C.F.R. § 54.101(a) (1998).

applicant is proposing to serve an area already served by a rural telephone company, the ETC designation must be in the public interest.¹⁰

B. Nextel Has Not Demonstrated That It Provides The Services Or Possesses The Facilities Required Of ETCs Or That The Requested Designation As An ETC Is In The Public Interest

The burden of establishing that an applicant provides all of the services supported by Federal Universal Service falls squarely on the telecommunications provider seeking ETC status. Nextel has not met this burden.

In its Petition, Nextel claims that its network supports service “throughout the Designated Areas in the Commonwealth of Pennsylvania.”¹¹ Nextel, however, has not presented any facts that prove this claim regarding the geographic coverage of its service. For example, Nextel did not provide a description of where its customers are located or a description of the location of its facilities that serve customers in the areas where it has requested designation as an ETC. Nextel has only made a blanket, conclusory statement that it provides service “throughout the Designated Areas.” Without specific facts to support this statement, Nextel has not satisfied its burden of proof.

Much of Pennsylvania is rural. Indeed, Pennsylvania is the third most rural state in the nation.¹² According to the Center for Rural Pennsylvania, almost half of Pennsylvania’s counties are considered rural. Further, nearly 3.4 million Pennsylvanians, or 28 percent of the state’s population, reside in those rural counties.¹³

¹⁰ 47 U.S.C. § 214(e)(2), (6).

¹¹ Nextel Petition at 2.

¹² Annual Report of the Pennsylvania Rural Development Council, Fiscal Year 2001-2002, *available at* http://sites.state.pa.us/PA_Exec/Rural_Dev/2002.pdf

¹³ http://www.ruralpa.org/rural_urban.html

The PTA contends that Nextel, in fact, does not provide service to many of these rural areas. For example, the PTA picked two rural telephone companies' areas at random, and found that Nextel serves neither. Pymatuning Independent Telephone Company, a Pennsylvania rural telephone company located in Mercer County, serves parts of three zip codes: 16125, 16150, and 16154. When these zip codes are inputted into the portion of Nextel's website informing customers of Nextel's networks coverage in specific areas,¹⁴ Nextel's website indicates that these areas are not covered by Nextel's network. The same is true for the service area of Venus Telephone Corporation, another rural telephone company that serves zip code 16364, in Venango County. If two attempts to randomly verify Nextel's claim of Pennsylvania-wide scope failed, how much more of its assertion of ubiquitous coverage is untrue?

In fact, examining Nextel's coverage maps for Pennsylvania located on the Nextel website,¹⁵ it appears that Nextel's coverage for Pennsylvania's rural areas is limited to narrow bands along interstate and major highways. This is not a case of a provider having "dead spots" in their network, as provided for in the Commission's regulations at Sections 22.99¹⁶ and 22.911(b).¹⁷ This is a case where Nextel has chosen not to cover hundreds of miles of rural territory, in which thousands of Pennsylvanians reside. Universal Service funding is not for the purpose of supporting limited cell phone usage by transient motorists on interstate highways.

¹⁴ <http://www.nextel.com/services/coverage/index.shtml>

¹⁵ <http://www.nextel.com/cgi-bin/localMarketMap.cgi?market=mkt54>
<http://www.nextel.com/cgi-bin/localMarketMap.cgi?market=mkt35>

¹⁶ 47 C.F.R. § 22.99.

¹⁷ 47 C.F.R. § 22.911(b).

Obviously, the Commission cannot rely upon Nextel's broad claims. This Commission should require Nextel to affirmatively prove, as the statute requires, that it has the capabilities to provide service throughout each service territory in which it seeks to be designated as an ETC.

In addition to not being able to establish that it provides universal service to the areas for which it is seeking ETC certification, Nextel admits to not providing some of the services supported by universal service at all. In its Petition, Nextel admits that it does not currently provide: toll limitation service; Lifeline service; or Link-Up service to its customers, but states that, should it be designated an ETC, Nextel will provide such services.

Nextel may provide *some* of the services supported by Federal Universal Service at *some* locations in Pennsylvania. In order to be designated as an ETC, however, Nextel must demonstrate that it provides *all* of those services at *all* locations where it desires to be designated as an ETC.

When the PTA member companies filed for certification as an ETC, they were required to affirmatively prove that they met all of the Federal Universal Service requirements. The PTA member companies respectfully request that this same standard be applied to Nextel. Not doing so would give Nextel an unfair competitive edge in that it would have access to Universal Service funding without providing the required services.

In addition, the Commission should also ensure regulatory parity when designating ETCs. That is, all ETCs in an area should be subject to the same service obligations. Currently, landline ETCs are required to offer a basic dial tone rate for local

service, Equal Access, and Local Number Portability (“LNP”). In the case of LNP, wireless providers have resisted providing this service for years. While these services are not currently explicitly required by the Commission’s regulations,¹⁸ the 5th Circuit Court of Appeals has held that TCA 96 did not foreclose states considering ETC petitions from imposing extra service requirements on the ETC applicants.¹⁹ It is logical, therefore, that since this Commission is acting in place of the PAPUC under its authority in TCA 96 Section 214, that the Commission can, and should, require Nextel to provide the same services as are required of Pennsylvania rural LECs.

Further, the designation of Nextel as an ETC in the rural areas served by PTA member companies has not been proven to be in the public interest. In its Petition, Nextel claims that its designation as an ETC “will provide a valuable alternative to the existing telecommunications regime” in the rural and remote areas of Pennsylvania.²⁰ It is difficult to understand how the designation of Nextel as an ETC will provide a “valuable alternative” to rural Pennsylvanians when Nextel’s network is incapable of providing service to many of those rural Pennsylvanians.

In addition, Nextel claims that its designation as an ETC will provide “an incentive to incumbent [local exchange carriers (“LECs”)] in the Designated Areas to improve their existing networks.”²¹ This argument is fallacious for two reasons. First, if the Universal Service Fund reaches a point where it can no longer grow, but the number

¹⁸ The Commission has ordered wireless providers to offer LNP no later than November 24, 2003. *See* CC Docket No. 95-116.

¹⁹ *See Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999).

²⁰ Nextel Petition at 6-7.

²¹ *Id.* at 7.

of companies that receive support from the Universal Service Fund continues to increase, rural LECs may not have the funding necessary to properly invest in their networks.

This is a very real concern. The Universal Service funding to wireless carriers has ballooned from less than \$500,000 in 1999 to an estimated \$100 million in 2003. The granting of ETC status to wireless carriers who have not met the goals of Universal Service will only exacerbate the problem. The Organization for the Promotion and Advancement of Small Telecommunications Companies (“OPASTCO”) has estimated that the Universal Service Fund’s High-Cost program will increase by approximately \$2 billion if all wireless carriers nationwide were granted ETC status.²² The Universal Service Fund cannot withstand such a high demand for funding.

Second, and more importantly, Pennsylvania LECs have invested heavily in rural Pennsylvania. In the past ten years alone, Pennsylvania LECs have spent over \$9.4 billion, or \$1,243.16 per access line,²³ in network modernization under Pennsylvania’s deployment statute, Chapter 30.²⁴ Pennsylvania leads the country in universal service, with 98% of Pennsylvanians having a telephone in their home. These figures demonstrate an unmatched commitment of providing affordable telephone service to the citizens of Pennsylvania on the part of the existing ETCs in the state.

Therefore, it is highly unlikely that the designation of Nextel as an ETC will improve the availability of telephone service in Pennsylvania. Indeed, provision of universal service will become even less feasible if the Universal Service Fund is further

²² STUART POLIKOFF, UNIVERSAL SERVICE IN RURAL AMERICAN: A CONGRESSIONAL MANDATE AT RISK at 21 (January 2003)

²³ Figures computed using existing access lines as of the end of 2002.

²⁴ 66 Pa.C.S. § 3001, *et seq.*

depleted by designating telecommunications providers as ETCs when those companies have not met the requirements for such a designation.

PTA member companies do not claim to be the only *possible* universal service providers. However, until a carrier can actually establish that it is providing universal service, that carrier is not entitled, by law, to draw from the Universal Service Fund. The Universal Service Fund is not a vehicle to subsidize competitors' business plans.²⁵ ETC applicants must be providing true universal service before this Commission should grant ETC status. Only carriers that actually provide universal service, not carriers that speculate that they potentially could provide such service, should receive universal funding. It is inequitable to allow a company to recover costs when that company did not incur the costs in the first place. For these reasons, Nextel's Petition is not in the public interest.

²⁵ See 47 U.S.C. § 254(e) ("A carrier that receives [Universal Service Fund] support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.")

IV. CONCLUSION

For the foregoing reasons, the Pennsylvania Telephone Association requests that Nextel's Petition for designation as an eligible telecommunications carrier in the Commonwealth of Pennsylvania be denied, without prejudice, or in the alternative, that this Commission hold hearings during which Nextel be required to present evidence that establishes that it has met all of the requirements for designation as an eligible telecommunications carrier.

Respectfully submitted,

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